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No. 87-.....

Supreme Court, U.S.
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# In the Supreme Court of the United States

OCTOBER TERM 1987

STEVEN KAY, et al.,

*Petitioners,*

v.

DAVID DOUGLAS SCHOOL DISTRICT No. 40, et al.,

*Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

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November 2, 1987

STEVENS-NESS LAW PUBLISHING CO., PORTLAND, OR. 97204 8710

## QUESTION PRESENTED

When plaintiffs in a state court civil rights action obtain all the relief that they seek and are awarded attorney's fees by the trial court, do they lose their entitlement to such fees under 42 U.S.C. § 1988 solely because a final judgment is not entered until after occurrence of the event that was the subject of their complaint, even though the fee award would have survived if the case had been brought in federal court?

## PARTIES

The parties to this proceeding in the Oregon Supreme Court were plaintiffs Steven Kay, James M. Strieby, Wendy Diebele, Dora Epstein, and Bette Disselbrett, and defendants David Douglas School District No. 40, Anthony Palermini, Robert Reese, Don Larson, Ed Gustafson, Marge Andersen, Scott

Rasmussen, James Olson, and Ray Rankin. This petition is filed on behalf of all plaintiffs who were parties in the Oregon Supreme Court.



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## OPINIONS BELOW

The opinion of the Oregon Supreme Court, dated July 8, 1987, is reported at 303 Or. 574, 738 P.2d 1389 (1987), and is set out in Appendix A, p. 1a. That Court's unreported Order Denying Reconsideration, dated August 4, 1987, is set out in Appendix C, p. 70a.

The opinion of the Oregon Court of Appeals is reported at 79 Or. App. 384, 719 P.2d 875 (1986), and is set out in Appendix B, p. 14a. The unreported trial court judgment is set out in Appendix D, p. 72a.

## JURISDICTIONAL STATEMENT

The decision of the Oregon Supreme Court was filed on July 8, 1987. A timely Petition for Reconsideration was denied on August 4, 1987, and this petition for writ of certiorari was filed within 90 days of that date. This

Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

STATUTE INVOLVED

42 U.S.C. § 1988 provides, in relevant part:

> "In any action or proceeding to enforce a provision of [§ 1983], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

STATEMENT OF THE CASE

Certain members of the 1984 graduating class of David Douglas High School, a public high school in Portland, Oregon, objected to the school's plan to include formal public prayers at their commencement program, scheduled for May 23, 1984. After school administrators and the District's board of directors rejected their request to eliminate the prayers, four seniors and the taxpayer-mother of one of them filed



this action in Oregon state court, on April 13, 1984.[1] Defendants were the school district, the district superintendent, and the members of the school board.

The complaint contained two counts. The first count, brought under the first and fourteenth amendments to the United States Constitution and under 42 U.S.C. § 1983, alleged that the inclusion of formal public prayers at commencement would violate plaintiffs' rights under the Free Exercise and Establishment Clauses of the first amendment. It sought an award of attorney's fees under 42 U.S.C. § 1988. The second

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[1] A fifth senior, Jill Takashima, was named as a plaintiff in the original complaint, but she withdrew from the case before trial and was not a party to the proceedings in the Oregon appellate courts.

count repeated the material factual allegations of the first count, and alleged that the proposed prayers would violate plaintiffs' rights under the religious liberty guarantees of the Oregon Constitution (Article I, sections 2, 3, and 5). It sought an award of attorney's fees under state law. Both counts sought declaratory and injunctive relief.

The trial on the merits was advanced and consolidated with the hearing on plaintiffs' motion for a preliminary injunction, and took place on May 4, 1984. At the end of the trial, the judge announced his decision from the bench. He declared that the planned inclusion of formal public prayer at commencement would violate plaintiffs' rights under both the state and the federal constitutions, and he ruled that plaintiffs'



request for injunctive relief would be allowed. (Tr. 124.)

Defendants complied with the judge's ruling, and the commencement occurred on May 23, 1984, with no formal public prayer. On May 30, 1984, plaintiffs filed their prevailing parties' cost bill, which included a request for attorney's fees in the sum of $2,900, supported by a detailed affidavit with time records and other pertinent information. Defendants filed timely objections. Plaintiffs responded with a legal memorandum setting out the basis for an award of fees, both under state law and under 42 U.S.C. § 1988, and a hearing on the matter was held on June 28, 1984. (Tr. 126-155.)

At that hearing, the trial judge reiterated that his ruling on the merits had been based on both state and

federal grounds (Tr. 153), and then ruled that plaintiffs were "entitled to recover reasonable attorney fees," without specifying whether the award was made under state law authority or under § 1988. (Tr. 154.) After concluding that the time invested by plaintiffs' counsel and the hourly rate requested were reasonable, the trial judge inserted an award of $2,900 for attorney's fees in the form of judgment that had been tendered by plaintiffs. The judge signed the judgment at the conclusion of the hearing. (Tr. 155.)

Defendants appealed to the Oregon Court of Appeals. On May 21, 1986, that court affirmed the judgment on the merits on state constitutional grounds, without reaching the First Amendment question. It also affirmed the attorney's fee award, holding that



"Plaintiffs have prevailed on a [state] constitutional claim that was factually identical to their federal civil rights claim, justifying an award of attorney fees under section 1988, which applies in state as well as federal courts." 79 Or. App. at 394. Plaintiffs then filed a motion for attorney's fees for work done on the appeal, based both on § 1988 and on state law grounds. On July 28, 1986, the Court of Appeals granted the motion and awarded fees of $2,794.50.

On defendants' Petition for Review, the Oregon Supreme Court reversed the Court of Appeals and directed that the trial court judgment, including the attorney's fee award, be vacated. "The problem," the Court said, was "... whether a justiciable controversy between the parties existed at the time of the [trial] court's judgment." 303 Or. at

577. The Court concluded that because commencement had taken place before the judgment was signed, no justiciable controversy existed on the date of the judgment, and that therefore the trial court should have dismissed the case.

The Court held that the same reasoning applied to the award of attorney's fees. Its discussion of the attorney's fee issue was brief:

> "The judgment holding defendants liable for plaintiffs' attorney fees might have prevented the case from becoming moot on appeal, because that award depended on plaintiffs' success on the merits. But the award of attorney fees did not occur until the court signed a written order or judgment, which the court did only on June 28, 1984, more than a month after the scheduled commencement exercises." 303 Or. at 578 (footnote omitted).

> "*** The circuit court should have dismissed the proceedings after the commencement exercises were over. The Court of Appeals should have so decided on its own motion. As



> the judgment for attorney fees would fall along with the belated judgment entered by the circuit court, defendants' reason for maintaining their appeal also would disappear." 303 Or. at 579.

The Court noted that it was expressing no opinion on the merits of the case. 303 Or. at 576 n.1.

Plaintiffs filed a timely Petition for Reconsideration, solely on the attorney's fee question. They argued that since they had achieved all the relief they had sought, and since they had done so as a direct result of their lawsuit, they were "prevailing parties" within the meaning of § 1988. They argued that they were therefore entitled to an award of attorney's fees under that statute, and that a justiciable controversy still existed as to that issue. The Oregon Supreme Court denied the Peti-

tion for Reconsideration, without opinion, on August 4, 1987. (Appendix A.)

REASONS FOR GRANTING THE WRIT

This case presents an important issue of federalism: may the standards for awards of attorney's fees under 42 U.S.C § 1988 in state court actions differ from the standards for such awards in federal court actions?

When this Court ruled in Maine v. Thiboutot, 448 U.S. 1, 10-11 (1980), that attorney's fees under § 1988 may be awarded by state courts, it noted that:

> "If fees [under § 1988] were not available in state courts, federalism concerns would be raised because most plaintiffs would have no choice but to bring their complaints concerning state actions to federal courts." 448 U.S. at 11 n.12.

This case illustrates that point. By denying attorney's fees to prevailing



plaintiffs solely because a judgment was not entered until after the defendants had altered their conduct in response to the trial court ruling, the Oregon Supreme Court has created a rule governing the availability of attorney's fees under § 1988 that is squarely contrary to the governing rule in the Ninth Circuit (and in every other federal circuit that has decided the issue). Moreover, the Oregon Court's holding that there was no justiciable controversy on the attorney's fee issue is squarely contrary to Hewitt v. Helms, ___ U.S. ___, 107 S.Ct. 2672, 96 L.Ed.2d 654 (1987) and Maher v. Gagne, 448 U.S. 122 (1980).

## I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THE FEDERAL COURTS OF APPEALS

If the present case had been brought in federal court, rather than in state court, every aspect of the case would have proceeded exactly as it did in Oregon's state courts, except for one thing: the plaintiffs would today have a judgment for attorney's fees.

Thus, the federal court, had it been hearing this case, presumably would have followed Carreras v. City of Anaheim, 768 F.2d 1039, 1042-43 (9th Cir. 1985), and would have decided the case on state constitutional grounds, just as the Oregon Court of Appeals did here. If it had reached the same result on the merits that the Oregon courts reached, the federal court would then have awarded attorney's fees to plaintiffs, just as the Oregon trial court and Court of Appeals



did, for the rule is settled in the Ninth Circuit that "When the plaintiff in a civil rights action prevails on a pendent state claim based on a common nucleus of operative fact with a substantial federal claim, fees may be awarded under § 1988." Id. at 1050.[2]

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[2] That rule appears to be followed by nearly every federal and state appellate court that has decided the issue. See, e.g., Seals v. Quarterly County Court, 562 F.2d 390, 393-94 (6th Cir. 1977); Kimbrough v. Arkansas Activities Ass'n, 574 F.2d 423 (8th Cir. 1978); Williams v. Thomas, 692 F.2d 1032, 1036 (5th Cir. 1982); Davis v. Everett, 443 So.2d 1232, 1235-36 (Ala. 1983); Filipino Accountants v. State Bd. of Account., 155 Cal. App.3d 1023, 204 Cal. Rptr. 913 (1984); County Exec., Prince Geo's Co. v. Doe, 300 Md. 445, 479 A.2d 352 (1984); Johnson v. Blum, 58 N.Y.2d 454, 461 N.Y.S.2d 782, 448 N.E.2d 449 (1983); Intern. Ass'n of Machinists v. Affleck, 504 A.2d 468, 470-71 (R.I. 1986); City of Fort Gates v. Cathey, 665 S.W.2d 586 (Tex. App. 1984); but see Caputo v. City of Chicago, 113 Ill. App. 3d 45, 446 N.E.2d 1240, 1242 (1983); Bd. of Trustees et al. v. Miss. Publishers Corp., 478 S.2d 269, 282 (Miss. 1985).

To this point, the hypothetical federal court case would have proceeded exactly as the actual state court case did. However, if the federal Court of Appeals had then vacated the judgment on the merits for lack of justiciability, as the Oregon Supreme Court did, its disposition of the attorney's fee award would have been exactly the opposite of the actual disposition in this case. The Oregon Court's only stated reason for holding that the award of attorney's fees could not stand was that it was not made until after commencement occurred. The rule in the Ninth Circuit is squarely to the contrary: "Claims for attorneys' fees *** survive independently under the court's equitable jurisdiction, and may be heard even though the underlying case has become moot." Williams v. Alioto, 625 F.2d 845, 848 (9th Cir. 1980), cert.



denied, 450 U.S. 1012 (1981); accord, Clark v. City of Los Angeles, 803 F.2d 987, 989-990 (9th Cir. 1986).

That principle has been applied in at least seven other circuits: if a party achieves the relief it seeks as the result of its lawsuit, the subsequent mootness of the case prior to entry of final judgment does not defeat that party's right to attorney's fees. Grano v. Barry, 783 F.2d 1104, 1109 (D.C. Cir. 1986); Exeter-West Greenwich Regional Sch. v. Pontarelli, 788 F.2d 47, 52-53 (1st Cir. 1986); Morrison v. Ayoob, 627 F.2d 669 (3d Cir. 1980), cert. denied, 449 U.S. 1102 (1981); DeMier v. Gondles, 676 F.2d 92 (4th Cir. 1982); Doe v. Marshall, 622 F.2d 118, 120 (5th Cir. 1980), cert. denied, 451 U.S. 993 (1981); Kimbrough v. Arkansas Activities Ass'n, 574 F.2d 423 (8th Cir. 1978); Martin v.

Heckler, 773 F.2d 1145, 1149 (11th Cir. 1985) (en banc) ("This is true even where the remedial action moots the lawsuit before trial and the plaintiff voluntarily dismisses the suit.")

Thus, the decision below establishes a rule for the recovery of fees under § 1988 in Oregon state courts that is squarely contrary to the rule that prevails in federal court. It therefore violates important principles of federalism, for the same full range of remedies should be available to civil rights plaintiffs whether they bring their actions in state court or in federal court. If the decision below is allowed to stand, that will not be the case in Oregon. The result will be that civil rights claims in Oregon will routinely be diverted from state to federal court, for most reasonable plaintiffs, faced with a



choice of two forums for the vindication of their claims, will choose the one where they can obtain attorney's fees if they prevail.

## II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AS TO THE MEANING OF "PREVAILING PARTIES" UNDER § 1988

The Oregon Supreme Court was wrong in holding that an award of fees under § 1988 depends upon the existence of a judgment on the merits. That view was expressly rejected by all members of this Court both in Hewitt v. Helms, ___ U.S. ___, 107 S. Ct. 2672, 2676, 96 L.Ed. 2d 654 (1987) (opinion of the Court); 107 S. Ct at 2679 (Marshall, J., dissenting), and in Maher v. Gagne, 448 U.S. 122, 129 (1980) (opinion of the Court); id. at 134 (Powell, J., concurring).

Under those cases, as well as Hensley v. Eckerhart, 461 U.S. 424 (1983), the critical question for an

award of fees under § 1988 is not whether a judgment was entered; rather, it is whether plaintiffs were the "prevailing parties." By any standard, the plaintiffs in this case prevailed. They achieved exactly what they sought, and all that they sought: an alteration in the threatened conduct of the defendants. What they sought was a commencement ceremony without formal public prayer, and that is what they achieved.

There is no doubt, moreover, that plaintiffs' lawsuit was the direct and immediate cause of that result. For several weeks before this action was filed, plaintiffs had urged the defendants, without success, to eliminate formal prayer from commencement. Ray Utz, the high school principal, testified that plaintiff Kay first approached him with his objections before the action was



filed, and Mr. Utz told him that "... we would not act upon the complaint of one or two people at that time." (Tr. 19.) After that conversation, the students sent a letter to the school board, requesting that formal public prayer be eliminated from the commencement program, and then attended a school board meeting on April 19, 1984, to present their request in person. (Tr. 20, 51-52, 75-76.) The school board rejected the request, and instead adopted a resolution specifically mandating that the commencement exercises should include formal public prayers. (Tr. 76.) It was only then that plaintiffs filed this action, and the board chairman made it clear at the trial that the defendants intended to have formal public prayers at the 1984 commencement exercises "unless we are so ordered to change." (Tr. 81.)

As it turned out, defendants did not have formal public prayers at the 1984 commencement ceremony, because, as defendants themselves put it, "... the defendants complied with the Court's oral ruling ...." ("Defendants' Objection to Plaintiffs' Cost Bill," p. 1.) This was the result that plaintiffs had sought from the beginning. They prevailed, in every sense of the word, and the facts here fit squarely within the unanimous view of this Court:

> "... [I]n a declaratory judgment action[,] if the defendant, under pressure of the lawsuit, alters his conduct (or threatened conduct) towards the plaintiff that was the basis for the suit, the plaintiff will have prevailed." Hewitt v. Helms, supra, 107 S. Ct. at 2676 (opinion of the Court); id. at 2679 (Marshall, J., dissenting).



It is clear, therefore, that by denying attorney's fees to these prevailing plaintiffs, the Oregon Supreme Court failed to follow controlling precedent in the interpretation of 42 U.S.C. § 1988. Its stated reason for holding that the trial court erred in awarding attorney's fees (namely, that no justiciable controversy existed on the date of the judgment) is wrong as a matter of federal law.

## CONCLUSION

The Oregon Supreme Court erred in holding that the absence of a "justiciable controversy" on the merits divested the trial court of jurisdiction to make an award of attorney's fees under § 1988. Its decision conflicts with controlling decisions of this Court and is squarely contrary to the rule prevail-

ing in the Ninth Circuit Court of Appeals.

For these reasons, this Court should issue a writ of certiorari to review the judgment and opinion of the Oregon Supreme Court.

Respectfully submitted,

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Attorney for Petitioners

November 2, 1987

[APPENDIX A]

IN THE SUPREME COURT OF THE

STATE OF OREGON

KAY, et al.,
Respondents on Review

TAKASHIMA,
Plaintiff,

v.

DAVID DOUGLAS
SCHOOL DISTRICT NO. 40, et al.,
Petitioners on review.

(TC A8404-02438; CA A32742; SC S33089)

In Banc

On review from the Court of Appeals.*

Argued and submitted January 20, 1987.

Kelly Clark, Portland, argued the cause and filed the petition for Petitioners on Review.

Charles F. Hinkle, Portland, argued the cause and filed the response for respondents on review.

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* Appeal from the Circuit Court for Multnomah County, Robert P. Jones, Judge. 79 Or App 384, 719 P2d 875 (1986).

LINDE, J.

The decision of the Court of Appeals is reversed, and the case is remanded to the circuit court with instructions to vacate judgment, with no costs to either party in that court or on appeal.

LINDE, J.

Plaintiffs sued for declaratory and injunctive relief against inclusion of formal prayer in the commencement exercises of the David Douglas High School graduating class of 1984, relying on provisions of the Oregon Constitution and the federal civil rights law, 42 USC § 1983. The circuit court entered a judgment granting the requested relief and awarding costs and attorney fees to plaintiffs. The Court of Appeals affirmed the judgment, holding that the inclusion of the invocation proposed by



defendants would violate Article I, sections 2 and 5, of the Oregon Constitution.[1] Kay v. David Douglas Sch. Dist. No. 40, 79 Or App 384, 719 P2d 875 (1986). We hold that on the date of the

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[1] Article I, section 2 of the Oregon Constitution provides:

> "All men shall be secure in the Natural right, to worship Almighty God according to the dictates of their own consciences."

Article I, section 5 of the Oregon Constitution provides:

> "No money shall be drawn from the Treasury for the benefit of any religeous [sic], or theological institution, nor shall any money be appropriated for the payment of any religeous [sic] services in either house of the Legislative Assembly."

The opinion of the Court of Appeals preceded and therefore did not have an opportunity to consider our opinion in Cooper v. Eugene Sch. Dist. No. 4J, 301 Or 358, 723 P2d 298 (1986). We do not imply approval or disapproval of the conclusions of the circuit court or the Court of Appeals.

circuit court's judgment there was no justiciable controversy before the court and that the Court of Appeals should have ordered dismissal of the proceeding.

When the circuit court signed the challenged judgment, the commencement exercises were past. No plaintiff demanded, nor did any allege facts entitling that plaintiff to demand, more general relief against future practices of defendants. The plaintiffs were four members of the high school class scheduled to graduate in May 1984, and Bette Disselbrett, the mother of one of the students. Their complaint was filed on April 24, 1984 and amended on April 25, 1984. On that date, the circuit court ordered defendants to show cause why the challenged religious activities should not be enjoined, and a show cause hearing was held on May 4. At the end of the



hearing, the presiding judge delivered an oral opinion from the bench, ending with the court's conclusion that injunctive relief enjoining formal prayer at the 1984 commencement exercises should be allowed, and announcing that "that will be the Order of this Court." The court then asked plaintiffs' attorney to prepare an order in consultation with the attorney for defendants.

After further proceedings on June 28, 1984 on plaintiffs' costs and attorney fees, the circuit court signed a judgment declaring that inclusion of formal public prayer at defendants' commencement exercises "violates Articles I, sections 2, 3 and 5 of the Oregon Constitution and the First Amendment of the United States Constitution," and enjoining defendants from including such prayer in "the commencement exercises for

the 1984 graduating class of David Douglas High School." It is undisputed that these exercises had occurred earlier as scheduled. The court also awarded plaintiffs attorney fees of $2,900 and $196.50 in costs and disbursements.

On appeal, both sides took the position that the case was not moot, plaintiffs on grounds that the facts leading to the judgment were capable of repetition, yet evading review, and defendants because the judgment would collaterally estop them in the future and because of the judgment awarding plaintiffs attorney fees. The Court of Appeals stated in a footnote:

> "This appeal is not moot, however, because the award of attorney fees is predicated on plaintiffs' entitlement to an injunction. Additionally, we retain jurisdiction, because the problem here is one 'capable of repetition, yet evading review."



79 Or App at 386 n.1 (citation omitted).

The problem, however, is not whether the appeal was moot, but whether a justiciable controversy between the parties existed at the time of the circuit court's judgment. A party with standing under the various applicable tests might, of course, seek relief against future repetitions of the challenged governmental act, but these plaintiffs presented no such claims to the circuit court. And a court cannot either mandate or enjoin an act after it has been completed, at least not until the cosmological theory of reversible time is better established. Suggestions to the contrary which date from language in Perry v. Oregon Liquor Commission, 180 Or 495, 498-99, 177 P2d 406 (1947), have been discarded in recent cases and should not be followed. See Cooper v. Eugene

Sch. Dist. No. 4J, 301 Or 358, 367 n.9, 723 P2d 298 (1986); Hay v. Dept. of Transportation, 301 Or 129, 134, 719 P2d 860 (1986); State ex rel Oregonian Publishing Co. v. Sams, 298 Or 329, 332, 692 P2d 116 (1984).

The judgment holding defendants liable for plaintiffs' attorney fees might have prevented the case from becoming moot on appeal, because that award depended on plaintiffs' success on the merits.[2] But the award of attorney fees did not occur until the court signed a written order or judgment, which the court did only on June 28, 1984, more than a month after the scheduled commencement exercises.

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[2] Attorney fees were claimed both under Oregon law, see Deras v. Myers, 272 Or 47, 535 P2d 541 (1975), and under 42 USC § 1988 for plaintiffs' federal claims under 42 USC § 1983.



The court's oral opinion from the bench following the May 4 hearing was not an order or a judgment. The Oregon Rules of Civil Procedure require ordinary injunctions as well as judgments to be in writing and signed by the judge. ORCP 70A., 79B.(2), 79D.[3] Rule 70A. states

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[3] ORCP 70A. provides:

> "Every judgment shall be in writing plainly labeled as a judgment and set forth in a separate document. A default or stipulated judgment may have appended or subjoined thereto such affidavits, certificates, motions, stipulations, and exhibits as may be necessary or proper in support of the entry thereof. No particular form of words is required, but every judgment shall specify clearly the party or parties in whose favor it is given and against whom it is given and the relief granted or other determination of the action. The judgment shall be signed by the court or judge rendering such judgment or, in the case of judgment entered pursuant to Rule 69B.(1) by the clerk."

(Footnote continued)

this expressly with respect to judgments (which include decrees, ORCP 67A.), and

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(Footnote 3 continued from previous page) ORCP 79B.(2) provides:

> "Every temporary restraining order granted without notice shall be endorsed with the date and hour of issuance, shall be filed forthwith, shall define the injury and state why it is irreparable, and shall state why the order was granted without notice."

ORCP 79D. provides:

> "Every order granting a preliminary injunction and every restraining order shall set forth the reasons for its issuance, shall be specific in terms, shall describe in reasonable detail (and not by reference to the complaint or other document) the act or acts sought to be restrained, and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with any of them who receive actual notice of the order by personal service or otherwise."



it also is clear with respect to preliminary injunctions from the requirement of Rule 79D. that prescribes the details required to be set forth in such orders. If an injunctive order did not have to be reduced to writing, compliance would depend on the memories of the participants in the hearing and would lead to disputes that could only be decided by transcribing the record of the hearing. It is doubtful that the circuit judge in this case thought that he was pronouncing a preliminary injunction in terms satisfying ORCP 79D.; in fact, he spoke in the future tense and asked plaintiffs' attorney to prepare an order. Signing the order was no merely ministerial act; if the judge had changed his mind or decided to add or alter details of his decision, he was not bound to what he said from the bench.

Consequently, there was no effective judgment until it was signed and entered according to ORCP 70B.[4] On the face of the pleadings and the interests asserted by these plaintiffs, there was by that date nothing for the court to decide. The circuit court should have dismissed the proceedings after the commencement exercises were over. The Court of Appeals should have so decided on its own motion. As the judgment for attorney fees would fall along with the belated judgment entered by the circuit court, defendants' reason for maintaining their appeal also would disappear.

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[4] ORCP 70B.(2) provides:

> "Notwithstanding ORS 3.070 or any other rule or statute, for purposes of these rules, a judgment is effective only when entered as provided in this rule."



The decision of the Court of Appeals is reversed, and the case is remanded to the circuit court with instructions to vacate the judgment, with no costs to either party in that court or on appeal.

BEST AVAILABLE COPY

[APPENDIX B]

KAY et al,
Respondents,

TAKASHIMA,
Plaintiff,

v.

DAVID DOUGLAS SCHOOL DISTRICT NO. 40
et al,
Appellants.

(A8404-02438; CA A32742)

Appeal from Circuit Court, Multnomah County.

Robert P. Jones, Judge.

Robert L. Dressler, Portland, argued the cause for appellants. With him on the briefs was Dressler & Granata, Portland. Charles F. Hinkle, Portland, argued the cause and filed the brief for respondents.

W. G. Kelly Clark and Robert LeChevallier, Portland, filed a brief amicus curiae for Christian Legal Society.

Before Buttler, Presiding Judge, and Warren and Rossman, Judges.

BUTTLER, P. J.

Affirmed.

Warren, J., concurring.

Rossman, J., dissenting.



BUTTLER, P. J.

In this action for declaratory and injunctive relief premised on the state and federal constitutions and 42 USC § 1983, defendants appeal from a judgment enjoining them from sponsoring, permitting or encouraging the inclusion of formal prayer in the invocation and benediction at the commencement exercises of the David Douglas High School class of 1984, and awarding attorney fees to plaintiffs.[1] The trial court held that the inclusion of the proposed prayer would violate Article I, sections 2, 3,

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[1] The 1984 commencement took place as scheduled, without a religious invocation or benediction. This appeal is not moot, however, because the award of attorney fees is predicated on plaintiffs' entitlement to an injunction. Additionally, we retain jurisdiction, because the problem here is one "capable of repetition, yet evading review." OSAA v. Stout, 71 Or App 405, 692 P2d 633 (1984).

and 5 of the Oregon Constitution and the First Amendment to the United States Constitution. We hold that the inclusion of the invocation would have violated Article I, sections 2 and 5, of the Oregon Constitution, and affirm.[2]

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[2] The parties are in agreement that the proposed invocation is a religious prayer:

"Let us pray:

"Our God the sustainer of our lives, we ask your presence here with us tonight and give you thanks for the possibilities you open to us for fuller, richer lives. As we honor these graduates who are ending one phase of their education, we are grateful for their accomplishments and for the families, teachers, friends who have helped them arrive at this point. We ask for your continued care and guidance as they go forth to new experiences. Enable these young people to face the future with courage and determination to find ways to create a better world for us all. Expand their visions; help them to follow their dreams and to live

(Footnote continued)



During the 1983-84 school year, plaintiffs Kay, Strieby, Deibele, and Epstein were seniors at David Douglas, expecting to be graduated with the class of 1984 and desiring to participate in

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(Footnote 2 continued from previous page)
satisfying lives in the world of peace.

"Bless each of us as we celebrate this night and keep us ever mindful of your goodness to us.

"Amen."

They do not appear to argue over the content of the proposed benediction:

"I want to speak well of education. The real test of education is how we live as individuals and as groups. If we cherish hatred and antagonism, our education has failed. When is a man educated? When he knows how to live, how to love, how to hope. Of all the forces that make for a better world, none is so indispensable, none so powerful, as hope. Without hope men are only half alive. With hope men dream and think and work. Graduates, help make a better world."

the commencement to be held on May 23, 1984, at the Portland Civic Auditorium. Plaintiff Disselbrett is the mother of plaintiff Epstein and a taxpayer in the David Douglas school district.

Defendant Utz, principal of the high school since 1973, testified that, to his knowledge, the school always has had a prayer-like invocation at its commencement. He said that the purpose of the commencement ceremony is to honor seniors and not to promote religion. Defendant Reese, chairman of the David Douglas School District School Board, agreed with Utz that the purpose of the commencement is ceremonial rather than religious. He stated that the decision was made to include the religious invocation, because it is a traditional part of the ceremony and because a majority of those taxpayers who had spoken to him had



expressed the desire to maintain that tradition. One hundred seventy-eight seniors signed a petition in support of the "traditional" ceremony.

The school district rented the Portland Civic Auditorium for the commencement at a rental of $1,450. The ceremony was planned by school personnel, on school time. The proposed program began with a processional march to "Pomp and Circumstance," following by the flag salute and the invocation. Utz testified that the program was planned with the view of creating an atmosphere of dignity and solemnity and that the invocation is included for that purpose. He agreed that that objective could be accomplished by many other means that would not involve a religious invocation, such as an appropriate reading from Shakespeare, Tennyson or other writers.

In years past, members of the clergy had been invited to give the invocation; recently, however, the board had selected retired school teachers who were particularly close to students, or senior teachers. The invocation for 1984 was written by Mrs. Fredrickson, a counselor and teacher of advanced English, who was to deliver it. There is evidence that she was not restricted as to its content,[3] and the one that she prepared is very similar to those that had been used in the past.

Attendance at commencement is voluntary. Students need not be present to receive their diplomas or awards.

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[3] However, Utz conceded that, if a Roman Catholic mass had been proposed, he would have honored the objection of a single dissenter. Clearly, there was some control of content, contrary to the statement of the dissent. 79 Or App at 402.



However, it is a ceremony in which every student is entitled to participate fully, regardless of his or her religious faith or absence of religious faith. Some of the highest awards that a member of the senior class can receive are announced at the commencement.

Kay, valedictorian of his class, attended a school board meeting on April 19, 1984, at which he and two other students urged the board not to include a vocal prayer, but to include instead a moment of silence or an appropriate reading from literature. He suggested that those who wished a religious ceremony could hold a separate baccalaureate at an area church. The board rejected that proposal and adopted a resolution directing the superintendent and principal to "include an invocation, benediction and choral music appropriate to the occa-

sion." It is agreed that the invocation written by Fredrickson was the invocation to be read at the ceremony, that it is a prayer and that its reading would be a religious activity.

This case was argued under the Oregon and federal constitutions. We consider the Oregon constitutional questions first. State of Kennedy, 295 Or 260, 666 P2d 1316 (1983). Plaintiffs contend that the inclusion of the religious invocation would have violated Article I, section 5, of the Oregon Constitution:

> "No money shall be drawn from the treasury for the benefit of any religeous [sic] or theological institution, nor shall any money be appropriated for the payment of any religeous [sic] services in either house of the Legislative Assembly."

Defendants contend that no money was actually spent on the invocation, because



the teacher who prepared and was scheduled to read it volunteered her time. The school district paid $1,450 from public funds to the city of Portland for use of the auditorium, and faculty time was devoted to the planning of the ceremony. The fact that money spent on the preparation and delivery of the invocation was not apportioned and identified as a "line item" in the budget does not take it out of the proscription of section 5, which prohibits the spending of any money for the benefit of any religious or theological institution. We need not decide whether the minimal expenditure of public funds, by itself, would have violated section 5, see Dickman et al v. School Dist. 62C et al, 232 Or 238, 366 P2d 533 (1961), cert den 371 US 823 (1962), because we believe that the broader concept encompassed within that section of

maintaining the wall of separation between church and state and of proscribing the establishment of religion would have been violated. We note, however, that section 5 expressly prohibits the appropriation of any money "for the payment of any religeous [sic] services in either house of the Legislative Assembly."

The Supreme Court has interpreted section 5 as far more than a mere prohibition of direct government financial support of a specific church-related institution. In Lowe v. City of Eugene, 254 Or 518, 451 P2d 117, 459 P2d 222, 463 P2d 360 (1969), cert den 397 US 1042 (1970), the court held that the prohibition of section 5 applied to the city's permitting the maintenance of a Latin cross in a public park, even though no money had been spent by the city. The



court reasoned that the display of the cross permitted "an inference of official endorsement of the general religious beliefs which underlie that symbol." 254 Or at 544. It further stated, citing United States Supreme Court cases, that "the government has no business placing its power, prestige, or property at the disposal of private persons or groups either to aid or oppose any religion." 254 Or at 545.

Although the Oregon Constitution contains no specific "credal preference" or "establishment" clause, the court reasoned that "it is obvious that the founders of this state did not intend to permit the state to sponsor any particular religion." 254 Or at 547. For that reason, the court stated, Article I, section 5, was included in the Oregon Constitution. In holding that

permitting the placing of a cross in a public place violated that provision, the court stated:

> "It is not the emblem of a religious belief which is objectionable under the state and federal constitutions; it is the enlistment of the hand of government to erect the religious emblem which offends the constitutions." 254 Or at 548.

Both Lowe and Dickman illustrate that Article I, section 5, has been regarded as Oregon's Establishment Clause and has been treated as expressing the state's commitment to a separation of church and state.

Some years later, in considering the same cross in the same park under different facts, the Supreme Court once again addressed the application of the Oregon Constitution to the separation of church and state, particularly Article I, section 5. Eugene Sand & Gravel



v. City of Eugene, 276 Or 1007, 558 P2d 338 (1976).[4] In determining the constitutionality of the city's conduct, the court adopted the three-part test established by the United States Supreme Court in Lemon v. Kurtzman, 403 US 602, 91 S Ct 2105, 29 L Ed 2d 745 (1971), for determining violations of the Establishment Clause of the First Amendment to the

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[4] The cross had not been removed. Subsequent to the court's decision in Lowe v. City of Eugene, supra, a complaint was filed alleging that circumstances had changed materially, in that the voters of the city had approved an amendment to the city's charter accepting the cross as a gift and dedicating it as a memorial or monument to United States war veterans. The court, in Eugene Sand & Gravel v. City of Eugene, supra considered the constitutionality of the display of the cross under those "changed circumstances" as if it were a different case from that presented in Lowe. It held that there was no constitutional violation, because the purpose of the display had become strictly secular, any effect to advance or inhibit religion was remote or incidental and there was no excessive entanglement by the city.

United States Constitution. The Court stated that religious activity engaged in by the government will violate the Oregon Constitution, unless (1) the conduct reflects a clearly secular purpose; (2) it has a primary effect (as distinguished from an "incidental" effect) that neither advances nor inhibits religion; and (3) it avoids excessive government entanglement with religion. Although the United States Supreme Court has departed from the three-part test in one "unique" case, Marsh v. Chambers, 463 US 783, 103 S Ct 3330, 77 L Ed 2d 1019 (1983), it has since reiterated its adherence to the test in a school prayer case. Wallace v. Jaffree, 472 US ____, 105 S Ct 2479, 86 L Ed 2d 29 (1985). We conclude that is it applicable here in assessing the school



district's conduct under the Oregon Constitution.[5]

The test should be viewed and applied within the broader framework of law that has developed around the Establishment Clause of the First Amendment. In Walz v. Tax Commissioner, 397 US 664, 668, 90 S Ct 1409, 25 L Ed 2d 697 (1970), the Court stated that the clause affords protection against sponsorship, financial support and active involvement of the sovereign in religious activity. A frequently quoted summary of the proscriptions is contained in the concurring opinion of Abington School Dist. v. Schempp, 374 US 203, 83 S Ct 1560, 10 L Ed 2d 844 (1963):

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[5] A later change in federal interpretation would not have affected Oregon's interpretation of its constitution. State v. Caraher, 293 Or 741, 653 P2d 942 (1982).

"*** What the Framers meant to foreclose, and what our decisions under the Establishment Clause have forbidden, are those involvements of religious with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends, where secular means would suffice. ***" 374 US at 294.

The courts have acknowledged and wrestled with the fact that religion is, and historically has been, a strong element of American life. As defendants contend, not all governmental references to a god are prohibited. See Lynch v. Donnelly, 465 US 668, 104 S Ct 1355, 79 L Ed 2d 604 (1984). History and tradition weigh heavily in a consideration of the extent to which government acknowledgment of religion may be incorporated in public ceremonies. In one case, Marsh v. Chambers, supra, the United States



Supreme Court employed an exclusively historical analysis in considering the constitutionality of a religious invocation at the opening of the Nebraska legislature. Article I, section 5, appears to sanction that practice in the Oregon legislature, so long as no funds are appropriated for it. Certain practices involving references to a god or having a religious origin have acquired over time nonreligious significance and have become a part of our national heritage and have taken on patriotic significance, such as the phrase "In God We Trust" that appears on coins. Also, the government has, from time to time, accommodated the religious practices of individuals, such as by the creation of a national holiday on December 25. Such an accommodation must, however, be distinguished from sponsorship or the conveyance of a message of

government endorsement or approval of religion.

Here, witnesses for the school board testified that the religious invocation was chosen in order to adhere to school tradition and to create an atmosphere of dignity and solemnity. They insist that the decision to include the prayer was not motivated by the desire to promote any particular religion or religion in general. There is also evidence, however, that the decision to include the prayer was motivated primarily by a desire to satisfy the wishes of a majority of the students and taxpayers, who, in turn, desired a religious invocation. If this was, in fact, the motivation, it is subject to the same attack on constitutional grounds as a decision made on purely religious grounds. See Lowe of City of Eugene, supra, 254 Or at 546.



The school board's decision to include a prayer instead of a non-religious reading that could have accomplished the alleged secular objectives is also an indication that the purpose for including the prayer was religious, not secular. Abington School Dist. v. Schempp, supra, 374 US at 294. In any event, no matter what the subjective intent of the school board, prayer by its nature is religious; accordingly, the purpose for which a prayer is given necessarily must be religious. It would be a contradiction in terms to say that the giving of a prayer has no religious purpose.

We also believe that the effect of the prayer here was to create the impression that government was sponsoring or endorsing religion. For many students and parents, commencement is the most significant high school experience. It

is long anticipated and involves much planning. Awards and special honors are presented and a great effort is made to create a memorable occasion. As defendants have emphasized, the invocation is a part of the ceremony; it sets the tone for the entire occasion. More than creating an atmosphere of dignity and solemnity, the inclusion of a religious invocation at the beginning of the ceremony would have created, from an objective standpoint, the impression that the school district assigned special significance to a prayer. The fact that the invocation was to be read by a senior teacher could have intensified that impression. The school district's affirmative decision directing that a prayer, rather than some other appropriate non-religious statement or reading, be included in this important school event



conveyed the message that it had given its endorsement to prayer and to religion. The inclusion of the prayer would have crossed the line from the accommodation of religion to an impermissible appearance of sponsorship. It matters not that attendance at the ceremony is voluntary, as defendants emphasize. Such a defense is not relevant to a challenge under the Establishment Clause. Engel v. Vitale, 370 US 421, 430, 82 S Ct 1261, 8 L Ed 2d 601 (1962).

The school board's action in directing the superintendent and principal of David Douglas High School to include the religious invocation required plaintiffs, including the class valedictorian, as well as other students, to choose between attending the ceremony or staying away. That action was in viola-

tion of Article I, section 5, of the Oregon Constitution.[6]

The amicus brief contends that the rights of students who wishes to

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[6] It also violated Article I, section 2:

> "All men shall be secure in the Natural right, to worship Almighty God according to the dictates of their own consciences."

Clearly, "the natural right to worship Almighty God," protected by Article I, section 2, includes the right not to worship. As Lafayette Grover, the chairman of the committee on the bill of rights at Oregon's Constitutional Convention in 1857, stated:

> "It is true that this constitution goes a step farther than other constitutions on this subject; but if that step is in the right direction, and consistent with the proper development of our institutions, I see no weight in the objection that it is new. Let us take the step farther, and declare a complete divorce of church and state." Carey, The Oregon Constitution 302 (1926).



express their faith through prayer are protected by the First Amendment to the United States Constitution. The Oregon Constitution contains a similar provision. Or Const, Art I, § 8. There is no doubt that one has the right to worship as one sees fit. However, we know of no authority that permits one, or even a majority, to require that a commencement exercise be opened with a vocal, public prayer. The argument does point out an important aspect of the problem: whether, how and when to pray is not, and should not be, a political question determined by majority vote. As the court said in Lowe v. City of Eugene, supra:

> "Religious freedom and majority rule must live side by side. The majority, no matter how pure its intentions, has no

> right under our system of government to exert its political muscle to gain a preferred place for its testimony to its religious beliefs." 254 Or at 546.

In any event, in this case no students have asserted that their rights were so violated, so the question is not presented.

Defendants assign error to the trial court's award of attorney fees to plaintiffs, arguing first that an award of attorney fees is not proper, because the trial court did not properly reach the federal question on which the award of attorney fees is based. (42 USC § 1983; 42 USC § 1988.[7]) The trial court

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[7] Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person
> (Footnote continued)



held for plaintiffs on both state and federal grounds. Whether the court was required to address Oregon law first does not alter the fact that plaintiffs prevailed on their federal claim. However, even if they had not so prevailed, they would not have been precluded from an award of attorney fees under section

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(Footnote 7 continued from previous page)

> within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Section 1988 provides:

> "In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, *** the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

1988. Plaintiffs have prevailed on a constitutional claim that was factually identical to their federal civil rights claim, justifying an award of attorney fees under section 1988, which applies in state as well as federal courts. Maine v. Thiboutot, 448 US 1, 100 S Ct 2502, 65 L Ed 555 (1980); Filipino Accountants' Ass'n v. State Bd. of Accountancy, 155 Cal App 3d 1023, 204 Cal Rptr 913 (1984); see Maher v. Gagne, 448 US 122, 132 n 15, 100 S Ct 2570, 65 L Ed 2d 653 (1980).

Defendants argue that, before plaintiffs are entitled to recover attorney fees under section 1988, there must have been a violation of rights. Here, it is argued, there has been no violation, because defendants complied with the court's order enjoining them from including the prayer in the ceremony. Defendants overlook the fact that the



purpose of this action was to prevent a violation of the rights that plaintiffs asserted, and that, but for the injunction issued in this action, there would have been a violation of those rights. Section 1988 provides for attorney fees to the prevailing party in any action brought under section 1983, and that includes an action to enjoin proposed unconstitutional state action. Fitzharris v. Wolff, 702 F2d 836 (9th Cir 1983). We need not decide whether the state may be compelled to award attorney fees; it is enough that the federal statute authorizes them here, even though there is no state statute authorizing them. We cannot say that the trial court abused its discretion in awarding plaintiffs attorney fees.

Finally, defendants assert that plaintiffs have failed to plead a basis

for the award of attorney fees as required by ORCP 68(C)(2):

> "A party seeking attorney fees shall assert the right to recover such fees by alleging the facts, statute, or rule which provides a basis for the award of such fees in a pleading filed by that party. ***"

In their complaint, plaintiffs alleged violations of section 1983, and then alleged that they were entitled to attorney fees; they pled no specific statutory basis or legal theory that would support the award.

Although plaintiffs might not have been entitled to attorney fees if this action had been brought only under state law, the right to attorney fees under section 1988, although a "part of the costs," is regarded by the United States Supreme Court as "an integral part of the remedies necessary to obtain" compliance with section 1983. Maine v. Thiboutot, supra, 448 US at 11. The right to attorney fees need not be alleged in the pleadings in an action brought in federal court. White v. New Hampshire Dept. of Empl. Sec., 445 US 445, 102 S Ct 1162, 71 L Ed 2d 325 (1982).



When federal claims are brought in a state court, state procedures ordinarily control. Brown v. Western R. of Alabama, 338 US 294, 70 S Ct 105, 94 L Ed 2d (1949). Here, however, we are not prepared to say that the right to attorney fees under section 1988 is strictly a matter of procedure. See Long v. Storms, 52 Or App 685, 629 P2d 827 (1981). The United States Supreme Court has made the provisions of section 1988 applicable in state courts. Maine v. Thiboutot, supra. ORCP 68, if applied to the federal claim for attorney fees, would do more than

implement state procedure; it would impose a pleading requirement for the recovery of attorney fees that is not present in the federal law. In Brown v. Western of Alabama, supra, 338 US at 298, the Court stated that "[s]trict local rules of pleading cannot be used to impose unnecessary burdens upon rights of recovery authorized by federal laws" and that uniformity of adjudication of federally created rights could not be achieved "[s]hould this court fail to protect federally created rights from dismissal because of overexacting local requirements for meticulous pleadings." Here, plaintiffs clearly alleged claims under section 1983, among others, and also alleged entitlement to attorney fees, an integral part of their remedy. Defendants were not prejudiced.

Affirmed.



WARREN, J., concurring.

Although the dissent makes the point that other examples of governmental nonneutrality toward religion are common, those examples prove nothing relevant to the constitutional challenge made here. It is no answer in this case that attendance at the commencement is voluntary, and it is no answer that there may be other inconsistencies between what government does and what it should do. As the lead opinion points out, certain originally religious references have acquired, over time, nonreligious significance. The prayer proposed to be offered at the commencement in this case does not fall within that category.

The greatness of this democracy is due in no small measure to the fact that we adhere to the principle that, although the majority rules, the rights

of minorities are fiercely respected. No student or parent entitled to attend a commencement ceremony or any other governmentally sponsored event should feel a need to remain away or compromise principles because he or she holds beliefs at variance with those of the majority of American citizens.

I join in Judge Buttler's opinion.

ROSSMAN, J., dissenting.

Although I agree with the majority that the appropriate analysis for determining violations of Oregon's "Establishment Clause," Or Const, Art I, § 5, is the three-part test established by the United States Supreme Court in Lemon v. Kurtzman, 403 US 602, 91 S Ct 2105, 29 L Ed 2d 745 (1972), I do not agree that, on the facts before us, there



is a violation in this case. Therefore, I must respectfully dissent.

In Eugene Sand & Gravel v. City of Eugene, 276 Or 1007, 558 P2d 338 (1976), cert den 434 US 876 (1977), the Oregon Supreme Court adopted the Lemon three-part test for analysis of questions under Article I, sections 2, 3 and 5, of the Oregon Constitution. In order to be constitutionally valid, governmental action must

> (1) reflect a clearly secular purpose;
>
> (2) have a primary effect (as distinguished from an incidental effect) that neither advances nor inhibits religion; and
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> (3) avoid excessive government entanglement with religion. 276 Or at 1012-13.

When applying this test, it is important to note that the Oregon Supreme Court recognizes that drawing the line between government neutrality toward

religion and government support of religion is a matter of degree. The analysis in these cases must retain some manner of flexibility. Oregon has adopted the philosophy that

> "'*** Devotion to the great principle of religious liberty should not lead us into a rigid interpretation of the constitutional guarantee that conflicts with the accepted habits of our people.'" Eugene Sand & Gravel v. City of Eugene, supra, 276 Or at 1014, (quoting McCollum v. Board of Education, 333 US 203, 256, 67 S Ct 461, 92 L Ed 649 (1948) (Reed, J., dissenting)).

With these basic principles in mind, I now turn to an application of the test to the facts before us.

(1) Secular Purpose

To meet the first prong of the Lemon test, governmental conduct must have a "clearly secular purpose." The majority disposes of this issue by saying that prayer is "inherently religious" and



that, therefore, in this case the purpose for which the invocation is used must necessarily be religious. This terse analysis fails, because it erroneously restricts itself to consideration of the nature of the conduct involved.[8] Even if prayer is, by its nature, religious, that is not the end of the inquiry. The United States Supreme Court recognizes that to "[f]ocus exclusively on the religious component of any activity would

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[8] In this case, defendants concede that the invocation is a prayer and that it is a religious activity. In the absence of such a concession, I would first inquire into the nature of the conduct involved, here, prayer. The majority suggests that all prayer is "inherently religious." I disagree. Whether something is "inherently religious" depends on one's point of view. An invocation that takes the form of a prayer may have a dual nature; to some listeners it will be religious, while to others it will be merely ceremonial. However, because defendants concede that this prayer is a religious activity, we need not decide the issue.

inevitably lead to its invalidation." Lynch v. Donnelly, 465 US 668, 680, 104 S Ct 1355, 79 L Ed 2d 604 (1984).[9] Indeed, I find it hard to imagine that there would ever be an Establishment Clause challenge to anything that was not, at its core, religious.

The proper inquiry is not into the nature of the challenged conduct; the controlling issue is whether the purpose for which the religious activity is being used in clearly secular. In Eugene Sand & Gravel v. City of Eugene, supra, a

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[9] Those federal courts that have considered Establishment Clause challenges to prayers do not automatically invalidate the activity simply because it is prayer, as the majority here would require. See, e.g., n 10, infra. The United States Supreme Court recognizes that prayer in a public setting may be unobjectionable when its use has a traditional, historical basis. Marsh v. Chambers, 463 US 783, 103 S Ct 3330, 77 L Ed 2d 1019 (1983).



large cross was being maintained on city property. The Supreme Court explained that the question was not whether the cross was a religious symbol, but whether, under the circumstances, the display of the cross on city-owned property satisfied the "clearly secular purpose" test. 276 Or at 1012. Accordingly, we look at the purpose for which something of religious character is being used.

In order to discern the school's intention in choosing an invocation to open the ceremony, we must review the evidence. Although the majority acknowledges that there is evidence that the purpose of the invocation is secular, the thrust of the majority's approach is that the evidence is immaterial, because prayer is by its nature religious and, therefore, the purpose for which it is

being used must necessarily be religious.[10] There may be more than one purpose for governmental action. The issue, however, is not whether one of the purposes is religious, but rather whether there is a "clearly secular purpose" as well.[11] There is no need to have an exclusively secular purpose. Lynch v. Donnelly, supra, 465 US at 681 n 6. Conduct that is motivated in part by a religious purpose may satisfy the requirement. It must be invalidated, however,

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[10] This approach views the activity objectively. Although such a standard is appropriate when determining the effect portion of the test, it is not properly applied here. Subjective intent, while not necessarily determinative, is relevant to discern actual purpose. See Lynch v. Donnelly, supra, 465 US at 690 (O'Connor, J., concurring).

[11] Even when the benefit to religion is substantial, the conduct may be constitutionally permissible if a secular purpose is demonstrated. Lynch v. Donnelly, supra, 465 US at 680.



if it is "entirely motivated by a purpose to advance religion." Wallace v. Jaffree, 472 US ___, 105 S Ct 2479, 86 L Ed 2d 29, 43 (1985) (emphasis supplied; footnote omitted). See also Lynch v. Donnelly, supra, 465 US at 680 (governmental conduct invalidated only where "activity was motivated wholly by religious considerations"); but cf. Stone v. Graham, 449 US 39, 101 S Ct 192, 69 L Ed 2d 199 (1980) (even though state had some secular objectives, posting of Ten Commandments in schools violated purpose test because religious purposes were dominant).

No one would question that the purpose of the commencement ceremony itself is secular: to provide a solemn occasion for the presentation of diplomas and other awards. The purpose for opening the ceremony with an invocation,

then, must be viewed in that context. The school chose an invocation for various reasons. The principal of the high school testified that an invocation was chosen to add a note of dignity, decorum and solemnity to the occasion. He also recounted that the high school had traditionally used an invocation as a ceremonial, formal way of opening commencement exercises. The United States Supreme Court has indicated that certain government acknowledgments of religion serve "the legitimate secular [purpose] of solemnizing public occasions." Lynch v. Donnelly, supra, 465 US at 693 (O'Connor, J., concurring). Tradition and history are also legitimate secular purposes for the use of prayer in public ceremonies. In Marsh v. Chambers, supra, although the Court did not specifically apply the three-part test, it



upheld the practice of opening a state legislature with a prayer because of history and long tradition. Although I agree that defendants may have had some religious purpose for including an invocation in the commencement exercises, it is clear to me from the evidence that any such purpose was neither exclusive nor predominant. Therefore, because there were legitimate, clearly secular purposes shown by the evidence, I would find that defendants have satisfied the first requirement of the three-part test.

(2) Primary Effect

Next, government conduct may be invalidated when it has a primary effect, as opposed to an incidental effect, that neither advances or inhibits religion. The effect of governmental conduct should be viewed objectively and in the context in which it occurs. Conduct can have a

clearly secular purpose, but if it actually advances or inhibits or, viewed objectively, would be perceived as advancing or inhibiting religion, it fails to pass constitutional muster. However, we must keep in mind that, when the effect merely happens to coincide or harmonize with the tenets of some religions, the constitutional guarantees are not violated. See Lynch v. Donnelly, supra, 465 US at 682; Marsh v. Chambers, supra, 463 US at 792. Even before its adoption of the three-part test, the Oregon Supreme Court recognized that Article I, section 5, of the Oregon Constitution does not prohibit the state from conferring any benefit upon religion. The principle of separation of church and state is not that strict; a certain amount of interplay is permissible. Dickman et al v. School Dist. 62C



et al, 232 Or 238, 247, 366 P2d 533 (1961), cert den 371 US 823 (1962).

It is the primary, and not any incidental, effect that is at issue. Viewing objectively the facts developed below, I would hold that the primary effect of the proposed invocation was not to advance or inhibit religion. The anticipated audience at the ceremony included honored seniors, their families and guests. The graduates[12] are on the brink of adulthood; parents and most of the guests are adults. There is little likelihood that the school's use of an invocation would actually advance religion, because those who would hear it were of sufficient maturity that they

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[12] The students had already fulfilled the educational requirements and had officially graduated; the commencement exercises were merely a ceremonial way of publicly conferring the diplomas.

were not readily susceptible to religious indoctrination. In Marsh v. Chambers, supra, the maturity of the audience was one factor considered by the court in upholding the use of prayers in state legislative chambers. 463 US at 792.

Neither would there be a perception that the school was advancing religion. The fact that a school employe, a senior teacher, was to give the invocation does not make the primary effect that of advancing religion. Indeed, use of clergy to offer an invocation in a similar situation would give more of an impression of advancing religion, yet just such a practice has been upheld.[13] Because the purpose of commencement is not pedagogical, but merely ceremonial, the audience would not

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[13] E.g., Stein v. Plainwell Community Schools, 610 F Supp 43 (WD Mich 1985).



have arrived at the auditorium seeking instruction, and a short invocation would not be perceived as an attempt to advance religious teachings. In this case, there was no indication that the invocation opportunity was exploited to proselytize or to advance one or disparage any other faith or belief. The audience would leave the ceremony with the impression that they had witnessed a dignified and solemn occasion, not a religious service.

This once-a-year use of an approximately 90-second invocation is readily distinguishable from daily school prayer, which has been held to violate the Establishment Clause.[14] Many of the children involved in daily school prayer cases are much younger than these gradu-

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[14] See, e.g., Engel v. Vitale, 370 US 421, 82 S Ct 1261, 8 L Ed 2d 601 (1962).

ated seniors and much more impressionable. Their attendance at school is mandatory. Although some of the challenged school prayer laws allowed students to be excused if they or their parents so desired, a request to be excused needed to be sought affirmatively, and the mere request might stigmatize the student. The commencement exercises we review, however, are totally voluntary;[15] they are not a part of the school's educational program. Students graduate whether or not they attend the ceremony. The commencement occurs but once a year, the invocation is a 90-second part of the two-hour ceremony, and a different audi-

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[15] Although I agree with the majority that the fact that attendance at the ceremony is voluntary is no "defense" to an Establishment Clause challenge, it is nonetheless one factor that should be considered when determining effect.



ence is present each year. Although a repeated religious exercise such as daily school prayer might be coercive and give the impression that the state was encouraging religion, the commencement invocation here would be perceived, as it had throughout the history of the high school, as setting a solemn, dignified tone for the ceremony. Accordingly, while there may have been some incidental effect to advance religion, that was not the primary effect. Therefore, defendants have satisfied the second requirement.

(3) Entanglement

Finally, governmental conduct must avoid excessive entanglement with religion. This requirement is violated if the government participates in an active manner in planning and organizing religious activities. Eugene Sand &

Gravel v. City of Eugene, supra, 276 Or at 1023. There is no serious challenge raised on this point. Defendants did not exercise any control over the content of the invocation.[16] The once-a-year cere-

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[16] This is unlike the Regent's Prayer invalidated in Engel v. Vitale, supra, where the state had composed an official prayer to be used in schools.

The majority, in footnote 3, mischaracterizes the evidence. The question to put to Mr. Utz went not to the issue of control over content of the invocation, but to whether the majority rules in deciding the content of graduation ceremonies. The question was:

> "Q. As a matter of fact, if every senior in the class but one wanted to have a Roman Catholic High Mass as a part of graduation and only one objected, you would honor that objection, would you not?
>
> "A. Well, you know, --
>
> "Q. You would not?
>
> "A. Well, yes, I would honor that objection."

There is, of course, a great difference between a Roman Catholic High Mass and a 90-second invocation.



mony did not involve any relations between local religious institutions and school officials, because clergy were not involved in the ceremony in any way. The teacher who was to deliver the invocation was not paid for her extra efforts, although she may have composed the invocation during work hours. These factors, along with the school's rental of the auditorium for the ceremony, hardly reach a level of "excessive entanglement."[17]

---

[17] The majority of courts that have addressed the issue of whether it is constitutional to include an invocation or benediction at a graduation ceremony where attendance is voluntary have found no violation of the Establishment Clause or Free Exercise Clause of the First Amendment. See Stein v. Plainwell Community Schools, supra (upheld the use of invocation and benediction in graduation ceremonies when they were traditionally delivered by students or clergy); Grossberg v. Duesebio, 380 F Supp 285 (ED Va 1974) (upheld use of invocation and benediction at commencement exercises where school's past ceremonies had included similar activities, and senior class made decision to include

(Footnote continued)

Defendants have also satisfied the third and final requirement.

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(Footnote 17 continued from previous page) them and paid expenses); Wood v. Mt. Lebanon Township School District, 342 F Supp 1293 (WD Penn 1972) (upheld use of invocation and benediction given by clergyman at graduation ceremony); Wiest v. Mt. Lebanon School District, 457 Pa 166, 320 A2d 362, cert den 419 US 967 (1974) (Pennsylvania Supreme Court held invocation and benediction delivered by clergy did not violate either the Pennsylvania Constitution or the Establishment Clause of the First Amendment). At least one court has held the inclusion of an invocation or benediction at graduation violative of the First Amendment. See Graham v. Central Community Sch. Dist. of Decatur, 608 F Supp 531 (SD Iowa 1985) (school board planned ceremony, at which Christian minister had delivered invocation and benediction for 20 years; court noted that prayer is inherently religious).

Plaintiffs cite Doe v. Aldine Independent School Dist., 563 F Supp 883 (SD Tex 1982), for the proposition that prayer at commencement exercises violates the Establishment Clause, but fail to note that in that case the prayer was a formal school prayer posted in large black letters over the entrance to the gymnasium and that it was recited or sung at pep rallies and athletic contests as well as at graduation ceremonies. The court found that the prayer violated the

(Footnote continued)



On the basis of this proper application of the three-part test, I would hold that defendants are entitled to prevail. Accordingly, I would reverse.

I am well aware that the issue presented by this case weighs very heavily on all citizens of this state. It is capable of evoking one's emotions as few others do. It is also a very troublesome one for judges--trial or

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(Footnote 17 continued from previous page) Establishment Clause, because it failed all three parts of the Lemon test. In Florey v. Sioux Falls School Dist. 49-5, 619 F2d 1311 (8th Cir 1980), the school board had adopted a policy statement and rules that allowed the observance of holidays having both a religious and secular basis. The rules also contained a provision permitting invocations and benedictions in commencement ceremonies. Although the court found no violation of the Establishment Clause, the plaintiffs challenged only the rules relating to observance of religious holidays, not those relating to the invocation and benediction.

appellate--who are called upon to decide it. From my own perspective, I cannot help but reflect on all the apparent inconsistencies that abound regarding the permissible interaction between church and state. The illustrations are limitless of how religion and government have been and still are intertwined. Our brothers and sisters in the legislative bodies sitting less than a block away from this court begin each legislative session with a prayer. Even in our own branch of government, references to God are not forbidden. The United States Supreme Court opens every session with the supplication, "God save the United States and this honorable court." State trial judges daily administer witness oaths invoking the name of God. Indeed, at this very court's most recent investiture, the new judge's clergyman offered a



prayer. The executive branch of government issues coins and currency for nationwide use bearing the national motto "In God We Trust." School children across the country repeat a pledge of allegiance that affirms that we are "one nation under God." In view of this and other evidence of pervasive governmental tolerance for and, indeed, approval of religion, I find it hard to believe that the framers of this state's constitution would fear that this 90-second invocation could somehow threaten to weaken the metaphorical wall separating church and state.

I have deep respect for the majority and its strong conviction as to the constitutional correctness of its decision. However, I feel with equal conviction that the majority has failed to analyze the facts properly and to

apply the test that the Oregon Supreme Court has adopted. As a result, it has decided the case erroneously. The facts show that there is no danger here of a governmental establishment of religion of the type which the constitution was meant to prevent.[18] As Justice Goldberg said, concurring in Abington School Dist. v. Schempp, 374 US 203, 308, 83 S Ct 1560, 10 L Ed 2d 844 (1963);

> "It is of course true that great consequences can grow from small beginnings, but the measure of constitutional adjudication is the ability and willingness to

---

[18] The majority adds, in a footnote, that the commencement invocation also violates Article I, section 2, of the Oregon Constitution. If that holding is based on the fact that an identical analysis applies to challenges under Article I, sections 2, 3 and 5, I fail to see why section 3 is not mentioned. If the holding is not based on the three-part test, the majority should explain the basis for its conclusion.



> distinguish between real and threat and mere shadow."

Respectfully, I dissent.

[APPENDIX C]

IN THE SUPREME COURT
OF THE STATE OF OREGON

| | | |
|---|---|---|
| STEVEN KAY; JAMES M. STRIEBY; WENDY DEIBELE; DORA EPSTEIN, by and through her mother, BETTE DISSELBRETT; and BETTE DISSELBRETT, | ) | ORDER DENYING RECON-SIDERATION |
| Respondents on Review, | ) | CA A32742 |
| JILL TAKASHIMA, | ) | SC S33089 |
| Plaintiff, | ) | |
| v. | ) | |
| DAVID DOUGLAS SCHOOL DISTRICT NO. 40; ANTHONY PALERMINI, individually and as Superintendent of David Douglas School District No. 40; and ROBERT REESE, DON LARSON, ED GUSTAFSON, MARGE ANDERSON, SCOTT RASMUSSEN, JAMES OLSEN, and RAY RANKIN, individually and as members of the Board of David Douglas School District No. 40, | ) | |
| Petitioners on Review. | ) | |



The Court has considered the petition for reconsideration and ORDERS that it be denied.

DATED: August 4, 1987

BERKLEY LENT
PRESIDING JUSTICE

PETERSON, C.J., NOT PARTICIPATING

[APPENDIX D]

IN THE CIRCUIT COURT OF THE
STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

| | | |
|---|---|---|
| STEVEN KAY, et al., | ) | |
| | ) | |
| Plaintiffs, | ) | No. A8404-02438 |
| | ) | |
| v. | ) | JUDGMENT |
| | ) | |
| DAVID DOUGLAS SCHOOL DISTRIST, NO. 40, et al., | ) | |
| | ) | |
| | ) | |
| Defendants. | ) | |

This matter came before the court on May 4, 1984, on plaintiffs' motion for a preliminary injunction. Plaintiffs appeared in person and through their attorney, Charles F. Hinkle, and defendants appeared in the persons of Anthony Palermini and Robert Reese and through their attorney, Robert L. Dressler.

The parties stipulated, pursuant to ORCP 79C.(2), that the trial of the action on the merits would be



advanced and consolidated with the hearing on the preliminary injunction, and the court has treated the hearing as a trial on the merits. The court issued its oral order of preliminary injunction on May 4, 1984, and the parties have stipulated that the matter may proceed to final judgment.

The parties presented evidence through witnesses and exhibits, and their attorneys submitted memoranda of law and presented oral argument to the court. The court being fully advised, it is hereby

ORDERED AND ADJUDGED as follows:

1. The court finds, concludes, and declares that the inclusion of formal public prayer at defendants' commencement exercises violates Article I, sections 2, 3, and 5 of the Oregon Constitution and

the First Amendment of the United States Constitution.

2. Defendants are enjoined from sponsoring, permitting, or encouraging formal public prayer to take place as part of the commencement exercises for the 1984 graduating class of David Douglas High School.

3. Plaintiffs are awarded attorney fees in the sum of $2,900 and their costs and disbursements in the sum of $196.50.

Dated: June 28, 1984.

Robert P. Jones
Circuit Judge

Supreme Court, U.S.
FILED
DEC 2 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-734

# In the Supreme Court of the United States

OCTOBER TERM 1987

STEVEN KAY, et al.,

*Petitioners,*

v.

DAVID DOUGLAS SCHOOL DISTRICT No. 40, et al.,

*Respondents.*

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

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December 1, 1987

STEVENS-NESS LAW PUBLISHING CO., PORTLAND, OR. 97204 8712

## QUESTION PRESENTED

Respondent does not agree with the statement of the question presented by Petitioner. The question, more precisely stated, is: When there existed an independent and adequate state law basis for attorney fees, whether the Oregon Supreme Court was nonetheless obliged to uphold an award of attorney fees under 43 USC § 1988, when the underlying judgment in Petitioner's favor was subsequently held to have been invalid at the time rendered, because of the failure of Petitioners to seek a timely written order or to seek relief against future activity by Respondents.

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**IN THE SUPREME COURT**
**of the United States**

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OCTOBER TERM 1987

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STEVEN KAY, et al.,

Petitioners,

v.

DAVID DOUGLAS SCHOOL DISTRICT No. 40, et al.,

Respondents.

---

**Brief in Opposition to Petition for a Writ of Certiorari To the Supreme Court of the State of Oregon**

---

Respondents David Douglas School District No. 40 et al. (hereinafter "Respondents") respectfully pray that the court deny Petitioner's

request for a Writ of Certiorari to review the opinion of the Oregon Supreme Court.

## OPINIONS BELOW

Respondents adopt the opinions below as set forth by Petitioner as accurate.

## JURISDICTIONAL STATEMENT

Respondents adopt the statement of jurisdiction as set forth by the Petitioner as accurate.

## STATUTE INVOLVED

Respondents adopt the statement of the statute involved as set forth by Petitioner as accurate.

## STATEMENT OF THE CASE

Respondents accept Petitioner's statement of the case, with the following summary and clarifications.



Petitioner brought this suit to enjoin the inclusion of an opening invocation at the 1984 commencement of David Douglas High School, a public high school in Portland, Oregon.

Petitioners, in their Complaint, sought no permanent declaratory or injunctive relief as to <u>future</u> commencements.

In the opinion of the Oregon Supreme Court, the "relief requested" was <u>not</u> granted, because the trial court did not render a judgment until after the commencement exercises had been held. The trial court's verbal expression of its opinion in petitioner's favor at the hearing on the merits several days before the commencement exercises did not constitute a valid judicial order. Thus,

Petitioner's statement that they "obtain(ed) all the relief that they (sought)" is not accurate.

REASONS FOR DENYING THE WRIT

The question presented by the Petition for Certiorari is perhaps mildly interesting from a theoretical standpoint, but of little practical or continuing importance. The question is whether the Oregon Supreme Court was obliged to uphold an award of attorney fees under 43 USC § 1988 where the underlying judgment in Petitioner's favor was subsequently held to have been invalid at the time rendered, because of the failure of Petitioners to seek, and the trial court to grant, a written order based upon the court's expression of its opinion that Petitioners were correct on



the merits. The issue presented thus arises literally by accident, as the result of two litigation errors by Petitioners: The first in failing to submit a written order to the trial judge in a timely fashion, thereby rendering the judge's opinion of no force and validity under the Oregon Rules of Civil Procedure. Secondly, in not seeking any form of permanent or prospective relief against future commencements, such that the judge's Order would have had prospective validity.

The combination of these errors is unlikely to be repeated in Oregon courts. This case, therefore, presents an issue to this Court that is at best unusual, fact-bound and idiosyncratic. This Court's review is not appropriate.

Petitioner's assertions of conflict between the decisions of the Oregon Supreme Court and decisions of this Court and lower federal courts are specious. Contrary to Petitioner's assertions, they simply were not "prevailing parties" in a 42 USC § 1983 action. Their lawsuit did not induce Respondent's to settle or voluntarily to alter their conduct. Any changed conduct was solely the result of a good-faith attempt to comply with what Respondents perceived to be a court order.[1] This compliance was involuntary, and

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[1] Respondents complied with the judge's opinion, notwithstanding the failure of Petitioners to obtain a Judgment and Order. Under these circumstances, there was little else that Respondents believed that they could do. To hold the commencement invocation would have been to risk contempt proceedings at the very least.



Respondents twice appealed. Though Respondents did not succeed in obtaining a reversal of the court's Order, they did succeed in having that Order vacated. Petitioners cannot contend that Respondents would have complied with the judge's opinion, "voluntarily," even if they had been aware of its invalidity. In short, Petitioners obtained redress if at all, only through a judicial decree. If the decree was legally invalid, Petitioners obtained no redress from their lawsuit. C.f., Hewitt v. Helms, _____ US _____, 107 S. Ct. 2672, 2676 (1987).

Petitioners also failed to point out that they had available to them independent and adequate grounds under Oregon State Law by which any of the

three Oregon Courts could have awarded attorney fees. See, Deras v. Myers, 272 Or 47, 535 P2d 541 (1975). Neither the Oregon Court of Appeals nor the Oregon Supreme Court saw fit to award fees under the available State precedent. For this Court to award attorney fees under 43 USC § 1988, then, when there existed an alternative State law remedy, is simply inappropriate.

The more interesting issue--whether a prayer of invocation at a public high school commencement ceremony violated the Establishment Clause of the First Amendment or Article 1, Sections 2, 3 or 5 of the Oregon Constitution--is not before this Court. Petitioners do not challenge the correctness of the Oregon Supreme Court's ruling that no



justiciable controversy existed at the time the trial court granted its order, or that the trial court's previous opinion was thereby rendered devoid of legal force. Given this concession, it is plain that the Oregon Supreme Court did not err in refusing to award attorneys' fees to a "prevailing party" in a nonjusticiable lawsuit.

## CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully Submitted,

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Attorney for Respondents

December 1, 1987

# SUPREME COURT OF THE UNITED STATES

STEVEN KAY ET AL *v.* DAVID DOUGLAS SCHOOL DISTRICT No. 40 ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OREGON

No. 87-734. Decided January 19, 1988

The petition for a writ of certiorari is denied.

JUSTICE WHITE, dissenting.

This case presents the difficult question whether a plaintiff can recover attorney's fees under 42 U. S. C. § 1988 when the underlying action has become moot because of compliance by the defendant with a court order. Here petitioners challenged respondents' plans to incorporate formal public prayer in the commencement exercises of a public high school. After numerous unsuccessful attempts to persuade respondents to drop the public prayer, petitioners brought suit in state court, challenging the respondents' plans as violative of the state and federal constitutions and seeking attorney's fees under state law and § 1988. The trial court made an oral ruling that the planned public prayer violated state and federal law, and consequently respondents dropped the public prayer from the commencement exercises. About a month after the commencement exercises, the trial court issued a written order reaffirming the earlier oral decision and awarding attorney's fees. The Oregon Court of Appeals affirmed the holding that the planned public prayer violated the state constitution and affirmed the award of attorney's fees under § 1988. 79 Or. App. 384, 719 P. 2d 875 (1986).

The Oregon Supreme Court reversed the Court of Appeals and remanded the case to the trial court to vacate the judgment. 303 Or. 574, 738 P. 2d 1389 (1987). The court reasoned that there was no longer a justiciable controversy because petitioners had already graduated, public prayer was not included in their commencement exercises, and petitioners did not seek to enjoin future repetitions of this challenged

conduct. The court held that under Oregon law, the oral order was not an effective preliminary injunction or final order until it was reduced to writing and by the time it was rendered in writing the controversy was no longer justiciable.

The Oregon Supreme Court's decision that a § 1988 fees award is not available in this case creates a conflict in the courts over the award of fees when the underlying action is rendered unreviewable after it has been filed. The courts are in agreement that a § 1988 fees award is proper where the defendant "voluntarily" complies under threat of the lawsuit, for such compliance, although mooting the lawsuit, shows acquiescence in the plaintiff's position. *E. g.*, *Martin* v. *Heckler*, 773 F. 2d 1145, 1148–1149 (CA11 1985) (en banc); *DeMier* v. *Gondles*, 676 F. 2d 92 (CA4 1982); see *Hewitt* v. *Helms*, —— U. S. ——, —— (1987) ("[I]f the defendant, under pressure of the lawsuit, alters his conduct (or threatened conduct) towards the plaintiff that was the basis for the suit, the plaintiff will have prevailed."). The more difficult question presented by this case is whether a defendant's "involuntary" compliance with a seemingly valid court order supports an award of fees under § 1988, where such compliance, under fear of contempt, moots a lawsuit such as this one but does not demonstrate acquiescence in plaintiff's position. The decision here denying an award of fees under § 1988 conflicts with decisions from three Circuits upholding § 1988 fees awards in the involuntary-compliance-plus-mootness context. *Grano* v. *Barry*, 783 F. 2d 1104, 1109–1110 (CADC 1986); *Williams* v. *Alioto*, 625 F. 2d 845, 847–848 (CA9 1980) *(per curiam)*, cert. denied, 450 U. S. 1012 (1981); *Doe* v. *Marshall*, 622 F. 2d 118, 119–120 (CA5 1980), cert. denied, 451 U. S. 993 (1981).

The federal issue raised by this petition for certiorari is substantial and requires resolution by this Court. An award of fees under § 1988 to these petitioners may be appropriate, for petitioners were in one sense "prevailing parties": al-

though the dispute was later held to be moot, the seemingly valid oral ruling by the trial court gave them all that they sought. On the other hand, there has never been a final determination, tested on appeal, that petitioners' position was legally sound. Arguably, respondents should not be forced to bear an award of fees where they have never been finally determined to have violated the Federal Constitution or laws and have steadfastly maintained the contrary position. And arguably, under *United States* v. *Munsingwear, Inc.*, 340 U. S. 36, 39–40 (1950), no party should be prejudiced by a decision which in the statutory scheme for judicial decisionmaking was only preliminary. The resolution of these competing concerns is plainly important to determining who is a "prevailing party" under § 1988. Because of the conflict in the courts over this question of federal law, I would grant certiorari.